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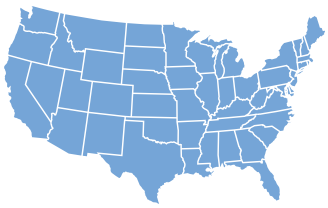
EMPLOYERS STATE LAW ALERT

Summarizing Significant New Employment Laws & Regs in All 50 States



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Wage Discrimination

As equal pay discussion heats up, states jump into fray

by Tammy Binford

Data from the U.S. Census Bureau show that, overall, women earn around 80 cents for every $1 that men earn. Different sources report different figures, but the gap between men's and women's pay is well-documented. That gap is in spite of federal and state laws aimed at ensuring equal pay for equal work.

On the federal level, the Equal Pay Act (EPA), which has been on the books since 1963, and Title VII of the Civil Rights Act of 1964 both prohibit pay discrimination based on sex, but the wage gap continues. Most states also have laws aimed at preventing wage discrimination based on sex. But many see a need for more legislation, and a number of state legislatures have heeded the call, particularly in the last couple of years. The more recent #MeToo movement has further energized equal pay proponents in just the last few months.

California is one of the states that has tackled the wage gap in recent years. When its beefed up equal pay measure went into effect on January 1, 2016, it was described as the strongest such law in the country. Shortly after California's new law took effect, a new law came online in New York providing more protection against wage-based discrimination. Other states also have taken action or have bills pending.

Here's a look at how just a few states have tackled the wage gap through legislation.

California

California has had an equal pay law since 1949, but it was strengthened through changes in 2016 and 2017. The 2016 law places the burden of proof on the employer to demonstrate that any difference in pay between men and women is based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a bona fide factor other than sex, such as education, training, or experience.

The law also requires equal pay for men and women who perform "substantially similar" work for an employer regardless of their location. Previously, the law required that men and women receive equal pay for equal work performed in the "same establishment," but the new law says that any pay difference between men and women will be examined in light of the business as a whole, not just a single location.

The law also prohibits employers from discriminating or retaliating against employees who inquire about wages, discuss the wages of others, or disclose their own wages

In 2017, another bill went into effect that prohibits employers from using past salary history by itself to

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Alan King, Editor • Brad Forrister, VP Content • With contributions from members of the Employers Counsel Network

justify a pay difference. That change stems from concern that salary history might institutionalize past pay practices that held down pay for women.

New York

Just a few weeks after California's latest legislation went into effect, a package of laws in New York took effect on January 19, 2016. Similar to California, New York requires men and women to be paid equally for the same work unless the pay difference is based on a seniority system, a merit system, a quantity or quality metric, or a "bona fide factor other than sex"—such as education, training, or experience—that is job-related and consistent with business necessity.

New York law also says employers can't prohibit their employees from discussing or disclosing wage information. In addition, state law prohibits discrimination based on "familial status," requires employers to provide reasonable accommodations to employees with pregnancy-related conditions unless such accommodations would pose an undue hardship, and prohibits all employers, even those with fewer than four employees, from engaging in sexual harassment.

Massachusetts

Amendments to the Massachusetts Equal Pay Act (MEPA) are effective July 1, 2018. In addition to broadening the definition of "comparable work" and limiting the allowed reasons for paying people of different genders differently, the new law prohibits employers from seeking salary history information from job applicants.

The state's new law allows only six reasons for paying different wages to men and women: (1) a seniority system, (2) a merit system, (3) a system that measures earnings by the quantity or quality of production, sales, or revenue, (4) the geographic location of the jobs, (5) education, training, and experience to the extent those factors are reasonably related to the job, or (6) the amount of travel required if it's a regular and necessary condition of the job.

The newly amended MEPA applies to all nonfederal employers—regardless of size—with employees who primarily work in Massachusetts. That includes state and city employers as well as employers located outside the state. The law covers full-time, part-time, seasonal, per diem, and temporary employees.

New Jersey

A new law taking effect July 18, 2018, prohibits paying employees in one protected class less than employees in another class protected by state law who are doing "substantially similar" work. So the law is broader than just requiring equal pay for men and women. It also prohibits discrimination based on race, sexual orientation, and the other classes outlined in the New Jersey Law Against Discrimination.

Any pay difference must be based on seniority or merit systems, or it must be based on legitimate factors such as training, education, experience, or the quantity or quality of production if those factors are job-related and based on a legitimate business necessity and aren't based on and don't perpetuate a differential in compensation based on the characteristics of members of a protected class.

Washington

An update to Washington's Equal Pay Act took effect June 7, 2018. Among other things, the new law prohibits gender-based pay discrepancies between employees of the same employer who are "similarly employed," meaning they perform jobs requiring similar skill, effort, and responsibility under similar working conditions.

Also, employers can't use an employee's previous pay to justify a pay difference between genders. In addition, employers must allow employees to disclose their pay or inquire about or discuss wages under certain circumstances.

Statutes

Alaska

OSHA

Increase in penalties

This law requires the department to set maximum and minimum civil penalties for occupational safety and health violations by employers. The penalties must conform to the Federal Civil Penalties Inflation Adjustments Act Improvements Act of 2015, which raised federal maximum penalties and tied future penalty amounts to the Consumer Price Index (CPI). The regulations resulting from this law will initially adjust maximum and minimum civil penalties for inflation going back to 1990 and then adjust penalties yearly according to changes in the CPI.

Cite: 2018 AK HB121 (3 pages)

Enacted: 5/25/2018

Effective: 5/25/2018

www.legis.state.ak.us/PDF/30/Bills/HB0121Z.PDF

Arizona

Analysis

Legislation

New laws a mixed bag for Arizona employers

by Dinita L. James

In addition to a much stricter data breach law, three other pieces of legislation have emerged from the Arizona Capitol as laws that bear on the employment relationship. They become effective August 3, 2018. Here's what you need to know about them.

Unemployment: 'Suitable work' expanded

Senate Bill (SB) 1398 is expected to have the long-term effect of lowering the unemployment tax rates that Arizona employers pay into the special fund from which benefits are paid to individuals who lose their jobs through no fault of their own. Already, Arizona ranks as the 13th lowest of

the 50 states in unemployment tax rates, according to 2017 data from the Tax Foundation. Tax rates are based on an employer's claims rate and range from less than 1% to 13% on the first $7,000 of each worker's pay.

The benefits paid to unemployed Arizona workers are lower than every state in the nation except Mississippi, with a weekly maximum payout of $240. When the amendments to A.R.S. § 23-776 go into effect, unemployed Arizona workers will have to accept a job paying at least $288 per week after four weeks of drawing benefits, regardless of what they were paid in their previous job.

Current law requires individuals drawing unemployment benefits to engage in "a systematic and sustained effort to obtain work during at least four days of the week," including at least one job contact on each of those four days. Current law also mandates that unemployed individuals accept "suitable work"; refusing suitable work disqualifies a person from continuing to draw benefits.

The new law eliminates, after four weeks of benefits, the individualized factors the Arizona Department of Economic Security (DES) is required to consider when determining whether an offered job is suitable. Those individualized factors include the "risk involved to the individual's health, safety and morals," as well as physical fitness for the work, experience, prior earnings, how long the person has been unemployed, the distance to the offered job, and the person's prospects for being able to secure local work in her customary occupation.

All of those factors will become irrelevant after four weeks of drawing benefits when SB 1398 becomes effective. Instead, the DES must consider work suitable if it pays more than 120% of the benefit amount. That's where the $288 comes in—it's 120% of the current weekly maximum. At the statewide minimum hourly wage of $10.50, that's a little more than 27 hours of work.

The measure passed on a strict party-line vote, and Governor Doug Ducey signed it without specific comment on May 16, at the same time he acted on the remaining bills passed during the session. His spokesman described the new law as "common-sense reform." The bill's primary sponsor, Senator Steve Smith (R-Maricopa), says there is a simple way for high-earning workers who lose their jobs to avoid being forced into part-time minimum-wage jobs: Don't apply for them.

But unemployment recipients will still need to make their four job contacts per week. Sometime after Labor Day, hiring managers in Arizona might just see a spike in applications for well-paid positions from people who aren't qualified or really interested in the position. It will take longer for those unemployment tax rates to come down.

Workers' compensation: LLC owners

The ALLOW Act, the less-than-perfect acronym for **House Bill (HB) 2047**'s full title, "Allow Limited Liability Companies to Opt In to Workers' Compensation Act," wasn't controversial, earning unanimous final passage in both houses. The new law resolves an ambiguity that has long divided Arizona employers and their workers' comp insurance carriers.

Arizona's workers' comp system is mandated by the state constitution and requires employers to provide coverage for employees' on-the-job illness or injury without regard to fault, either by purchasing insurance or meeting state requirements to be self-insured. All employees must be covered, unless they choose to opt out. The Industrial Commission of Arizona, which enforces compliance with the coverage mandate, can obtain civil penalties as well as injunctions to shut businesses down if they don't purchase or make their own arrangements for coverage.

Unclear under existing law was how working owners of incorporated small businesses and members of limited liability companies (LLCs) should be treated. Are they employees for whom the entity must provide coverage? If they are covered, how should their compensation, which affects premiums and benefit amounts, be determined? The ALLOW Act gives us the answers to those questions by amending the definition of "employee" throughout the workers' comp statutes.

Under the new law, working members or shareholders of both corporations and LLCs count as employees for purposes of the Arizona workers' comp laws if they own less than 50% of the entity. That means insurance carriers have no choice but to cover them, while the individuals themselves retain their right to opt out, just like every other Arizona employee. If a working owner controls 50% or more of the entity, however, the insurance carrier has to agree to cover the owner, and the coverage must be stated in an endorsement as part of the policy documents.

As far as how the working owner's compensation is determined, the new law sets a minimum of $600 per month and a maximum equal to the state statutory maximum benefit ($4,625.92 for 2018), and the entity and the carrier can agree to any monthly amount in between if it is stated in the policy documents. That's the amount that will govern for determining premiums, but for any payout of disability benefits, the amount will be the *lesser* of the monthly amount stated in the policy or the actual average monthly wage earned by the working owner at the time of the injury, which is routine for all injured workers in Arizona.

Although the new law becomes effective August 3, it applies to policies issued or renewed on or after July 1, 2019.

Liability: hiring ex-offenders

The third new law, **HB 2311**, also received unanimous support from Arizona legislators. The law provides a broad exemption from negligent hiring claims for employers that hire employees or independent contractors who have criminal convictions. In cases where the negligent hiring claim is based on more than just the past conviction, the new law prevents evidence of the conviction from being introduced in the case.

For negligent supervision claims, evidence of a prior conviction can be introduced, but only if the employer knew of the conviction—or was grossly negligent in not knowing about the conviction—and the conviction was directly related both to the nature of the work and the conduct that gave rise to the claim.

There are three significant exceptions to the new law. The liability exemption and evidentiary exclusion do not apply if:

- The claim is misuse of money or property of a third party, and on the date of hire or contracting, the employee had a conviction for fraud or the misuse of money or property, and it was foreseeable that the job would involve discharging a fiduciary responsibility in the management of money or property;
- The claim is misappropriation of money, and on the date of hire or contracting, the employee had a conviction for fraud or the misuse of money or property, and the employee was hired to work as an attorney; and
- The claim involves violence or use of excessive force, and the employee was hired as a law enforcement officer or security guard.

The house summary of the bill noted that six other states have recently adopted similar legislation limiting an employer's liability for hiring a person previously convicted of a crime. The approach adopted by Arizona is the "carrot" counterpart to the ban-the-box laws, which prohibit asking job applicants about criminal convictions, at least in the early stages of the hiring process. With this new "get-out-of-court-free" exemption, some Arizona employers may decide it isn't worth the cost of doing criminal background checks for many jobs.

Bottom line

While education funding dominated the news during the 2018 legislative session, a handful of bills became laws that will have some kind of impact on Arizona workplaces. It remains to be seen whether the cumulative effect will be a positive one.

Excerpted from *Arizona Employment Law Letter*
Dinita L. James, Editor
Gonzalez Law, LLC

Colorado

Workers' Compensation

Exemption for certain out-of-state employers

This law establishes an exemption from the state's workers' compensation laws for an out-of-state employer whose employees are working in Colorado on a temporary basis as long as (1) the out-of-state employer furnishes coverage under the workers' comp laws of the state in which the employee is regularly employed and (2) the out-of-state employer's home state is contiguous to Colorado, recognizes the exemption, and provides a reciprocal exemption for Colorado employees temporarily working in that state. The home state's workers' comp laws are the sole remedy for an out-of-state worker who is injured while working temporarily in Colorado.

Cite: 2018 CO HB2722, CO Pub. Ch. 182 (3 pages)

Enacted: 4/30/2018

Effective: 4/30/2018

https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_1308_signed.pdf

Connecticut

Wages

Pay equity

This law generally prohibits employers, including the state and its political subdivisions, from asking or directing a third party to ask about a prospective employee's wage and salary history. The prohibition doesn't apply (1) if the prospective employee voluntarily discloses her wage and salary history or (2) to any actions taken by an employer, employment agency, or its employees or agents under a federal or state law that specifically authorizes the disclosure or verification of salary history for employment purposes. The law also allows an employer to ask about the other elements of a prospective employee's compensation structure (e.g., stock options), but the employer may not ask about their value. The law allows prospective employees to bring a lawsuit within two years after an alleged violation of the bill's prohibition on asking about salary histories. Employers can be found liable for compensatory damages, attorneys' fees and costs, punitive damages, and any legal and equitable relief the court deems just and proper.

Cite: 2018 CT HB5386, CT Pub. Ch. 18-8 (3 pages)

Enacted: 5/22/2018

Effective: 1/1/2019

https://cga.ct.gov/2018/ACT/pa/pdf/2018PA-00008-R00HB-05386-PA.pdf

Maine

Employee Conduct

Drug use

This law implements a regulatory structure for the adult use of marijuana. It provides that except as otherwise provided in the Maine Medical Use of Marijuana Act, an employer (1) is not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or cultivation of marijuana or marijuana products in the workplace, (2) may enact and enforce workplace policies restricting the use of marijuana and marijuana products by employees in the workplace or while otherwise engaged in activities within the course and scope of employment, and (3) may discipline employees who are under the influence of marijuana in the workplace or while otherwise engaged in activities within the course and scope of employment in accordance with the employer's workplace policies regarding the use of marijuana and marijuana products by employees.

Cite: 2018 ME HB1199, ME Pub. Ch. 409 (82 pages)

Enacted: 5/2/2018

Effective: 5/2/2018

www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1199&item=4&snum=128

Maryland

Hiring

Veterans preference

This law expands the definition of "eligible veteran" to include veterans of the Commissioned Corps of the Public Health Service and the Commissioned Corps of the National Oceanic and Atmospheric Administration for the purpose of authorizing an employer to grant a hiring and promotion preference to an eligible veteran, the spouse of an eligible veteran who has a service-connected disability, or the surviving spouse of a deceased eligible veteran.

Cite: 2018 MD HB1617, MD Pub. Ch. 586 (2 pages)

Enacted: 5/15/2018

Effective: 10/1/2018

http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_587_hb1617t.pdf

Public Employers: Employee Conduct

Sexual harassment prevention training

This law requires all state employees to complete at least a cumulative two hours of in-person or virtual interactive training on sexual harassment prevention within (1) six months of an employee's initial appointment and (2) every two-year period thereafter. The training must address specified items, including additional training for supervisors. For Executive Branch units, the equal employment opportunity (EEO) coordinator must enforce the requirements of the law and may recommend that a performance audit or review be performed by the Office of Legislative Audits if the EEO coordinator determines that a unit has not complied with the law.

Cite: 2018 MD HB1423, MD Pub. Ch. 791 (5 pages)

Enacted: 5/15/2018

Effective: 10/1/2018

http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_791_hb1423t.pdf

Public Employers: Employee Leave

Paid parental leave

This law provides up to 60 days of paid parental leave to an employee in the Executive Branch of state government who is the primary caregiver responsible for the care and nurturing of a child to care for the child immediately following either the child's birth or the adoption of a child who is younger than age six. An employee entitled to parental leave may use available accrued annual leave and personal leave. If that leave is less than 60 days, the state agency employer must provide the employee with additional paid leave to attain 60 days of parental leave.

Cite: 2018 MD SB859, MD Pub.Ch. 752 (3 pages)

Enacted: 5/15/2018

Effective: 10/1/2018

http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_752_sb0859e.pdf

Analysis

Sexual Harassment

New law prevents Maryland employers from asking employees to waive sexual harassment claims

by Kevin C. McCormick

As many of you know, whenever the Maryland Legislature is in session in Annapolis, employers need to be concerned. On April 9, the legislature announced its final adjournment, which signaled the end of its 2018 legislative session. Lawmakers were considering four significant pieces of legislation that, if enacted, would have a significant effect on Maryland employers. Only one of those bills survived and was signed by Governor Larry Hogan. The surviving bill will have a major impact on how Maryland employers deal with sexual harassment claims.

Bill that passed is a doozy

The lone bill passed by the General Assembly is **HB 1596,** titled the Disclosing Sexual Harassment in the Workplace Act of 2018. The legislation is designed to prevent employers from asking employees to waive their future right to report sexual harassment. The bill also requires employers with 50 or more employees to disclose how many settlements of sexual harassment allegations they have reached, how many times they have settled allegations against the same employee, and the number of settlements that included nondisclosure provisions.

Under the law, Maryland employers with 50 or more employees are prohibited from taking adverse action against employees because they fail or refuse to enter into agreements that contain a waiver of sexual harassment claims, including provisions requiring them to resolve future sexual harassment and retaliation claims through arbitration. Under the legislation, such agreements are "null and void as being against the public policy of the state."

"Adverse action" is defined in the bill as discharge; suspension; demotion; discrimination in the terms, conditions, or privileges of employment; or any other actions that would dissuade a reasonable employee from making a complaint or testifying about a violation of the law. An employer that enforces or attempts to enforce a contractual provision in violation of the law would be liable for the employee's reasonable attorneys' fees and costs.

Another aspect of HB 1596 that deserves attention is the requirement that on or before July 1, 2020, and on or before July 1, 2022, covered employers must complete a survey for the Maryland Commission on Civil Rights (MCCR) that discloses the following information:

- The number of settlements entered into by or on behalf of the employer after an employee made an allegation of sexual harassment;
- The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and

- The number of settlements after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential.

Employers must submit the survey to the MCCR electronically. There will be space for an employer to report whether it took any personnel action against an employee who was the subject of a settlement disclosed in the survey.

The MCCR is required to publish and make accessible on its website the aggregate number of responses from employers for each of the three categories of information. Upon request, the commission may disclose the response from a specific employer regarding the number of times it has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment.

HB 1596 also requires the MCCR to review a random selection of surveys on or before December 15, 2020, and again on December 15, 2022, and create an executive summary, redacting any identifying information for specific employers. The commission must then submit the executive summary to the governor as well as the Senate Finance Committee and the House Economic Matters Committee.

An initial draft of HB 1596 would have required employers with 50 or more employees to report on or before January 1 of each year the number of settlements they entered into after employees made allegations of sexual harassment. The report would have included information about:

- The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 20 years of employment; and
- The number of settlements after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential.

Moreover, the MCCR would have been required to publish and make accessible on its website each employer's annual report.

The fact that those onerous provisions were deleted from the final proposal is certainly good news for Maryland employers. However, under the version of HB 1596 that passed, employers must still submit a survey disclosing information about their sexual harassment settlements on or before July 1, 2020, and on or before July 1, 2022. By its terms, the requirement to submit the survey to the MCCR would expire on June 30, 2023.

Bottom line

Covered Maryland employers need to review and revise their standard employment agreements to comply with the new law. After October 1, 2018, any waivers of substantive or procedural rights or remedies that require job applicants or employees to arbitrate sexual harassment claims rather than adjudicating them in court will be prohibited. Moreover, covered employers should be mindful that any confidentiality or nondisclosure provisions in settlement agreements involving sexual harassment or retaliation claims must be reported to the MCCR in two biannual surveys and may be subject to public disclosure.

Excerpted from *Maryland Employment Law Letter*
Kevin C. McCormick, David M. Stevens, Editors
Whiteford, Taylor & Preston, L.L.P.

Workers' Compensation

Self-insured employers

This law expands the authority of the Maryland Insurance Administration's Insurance Fraud Division to encompass investigating and taking action on fraud committed by or against a governmental self-insurance (workers' compensation) group and employers that self-insure. The law also expands the definition of "insurance fraud" and requires governmental self-insurance (workers' compensation) groups and employers that self-insure or participate in a self-insurance group for workers' comp to report suspected insurance fraud cases, in writing, to the Insurance Fraud Division. Information submitted to the division in this manner is not subject to public inspection, except under specified circumstances.

Cite: 2018 MD HB1499, MD Pub. Ch. 533 (5 pages)

Enacted: 5/8/2018

Effective: 10/1/2018

http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_533_hb1499t.pdf

New Hampshire

Employer Violations

Debarment of employers as vendors on state contracts

This law adds wage theft, violations of worker safety practices, and misclassification of employees as grounds for debarment of a vendor on a state contract.

Cite: 2018 NH HB1623, NH Pub.CH. 82 (2 pages)

Enacted: 5/25/2018

Effective: 7/24/2018

www.gencourt.state.nh.us/bill_status/billText.aspx?sy=2018&id=1550&txtFormat=pdf&v=current

New Jersey

Employee Benefits

Required sick leave

This law requires each employer to provide earned sick leave to each employee it employs in the state. The law prohibits retaliatory personnel actions against an employee for the use or requested use of earned sick leave or for filing a complaint for an employer violation. It sets requirements for record keeping and for notifying workers of their rights. In cases of employer noncompliance with the bill's requirements, the law provides certain penalties based on noncompliance with state laws regarding the payment of wages, including the New Jersey State Wage and Hour Law.

The law requires employers to provide employees notification, in a form provided by the commissioner of labor and workforce development, of their rights including, the amount of earned sick leave to which they are entitled and the terms of its use. The commissioner is required to make

these notifications available in English, Spanish, and any other language the commissioner determines is the first language of a significant number of workers in the state.

The law preempts any county or municipal ordinance, resolution, law, rule, or regulation regarding earned sick leave. It also sets a minimum standard for earned sick leave, but it does not prevent any employer policy, collective bargaining agreement, or other law or ordinance that sets a higher standard. Public employers are exempt from the provisions of the law if they are required to provide their employees with sick leave with full pay under any other law, rule, or regulation of the state.

Cite: 2018 NJ AB1827, NJ Pub. Ch. 10 (8 pages)

Enacted: 5/2/2018

Effective: 9/1/2018

www.njleg.state.nj.us/2018/Bills/PL18/10_.PDF

Analysis

Legislation

New Jersey takes the lead in equal pay legislation

by Dina M. Mastellone and Allison M. Benz

Following up on his January 16, 2018, Executive Order promoting equal pay for equal work, New Jersey Governor Phil Murphy signed a historic and sweeping equal pay law on April 24, 2018. The Diane B. Allen Equal Pay Act is named after former Republican Senator Diane B. Allen, herself a victim of bias who was part of the original negotiations surrounding the bill when it was first proposed under former Governor Chris Christie.

The new equal pay law applies to all employers in New Jersey regardless of size and is scheduled to take effect on July 1, 2018. The new law combats not only gender pay discrimination but also wage discrimination against those protected by the New Jersey Law Against Discrimination (NJLAD).

Coverage

The equal pay law amends the NJLAD and makes it illegal for an employer to pay employees who are members of a protected class recognized under the NJLAD at a lower rate than employees who are not members of a protected class for "substantially similar work" unless a pay differential is justified by a legitimate business necessity. Under the NJLAD, protected characteristics include:

- Race;
- Creed;
- Sex;
- Color;
- National origin;
- Ancestry;
- Nationality;
- Disability;
- Age;
- Pregnancy or breastfeeding;
- Marital, civil union, or domestic partnership status;
- Affectional or sexual orientation;
- Gender identity or expression;
- Military status; and
- Genetic information or atypical hereditary cellular or blood traits.

"Substantially similar work" is determined by a combination of the "skill, effort and responsibility" required for the position and is not limited to employees who work in a specific geographic area or region.

Moreover, although the legislation carves out an exception for pay differentials based on certain factors like merit, seniority, and education, the exception is allowed only as long as the factors do not perpetuate a sex-based differential in compensation. For example, if one employee has a different title than another employee or even works in a different department and both employees perform the same types of tasks with similar levels of responsibility, they should be paid the same.

An employer may pay a different rate of compensation only if it demonstrates that:

- The differential is made under a seniority or merit system.
- The differential is based on one or more legitimate, bona fide factors other than the characteristics of members of a protected class—e.g., training, education, experience, or the quantity or quality of production.
- The factors are not based on—and do not perpetuate—differential in compensation based on sex or another characteristic protected under the NJLAD.
- Each of the factors is applied reasonably.
- One or more factors account for the entire wage differential.
- The factors are job-related regarding the position in question and are based on a legitimate business necessity.

Prohibitions

The new law makes it easier for employees to win pay discrimination cases since all they need to show is that they were paid unequally for "substantially similar work" rather than the previous standard of "substantially equal" work. Employers are not permitted to reduce the compensation of an employee to achieve compliance.

The new law also prohibits employers from retaliating against employees who (1) oppose practices or acts forbidden under the law; (2) seek legal advice regarding their rights under the law; (3) share relevant information with legal counsel or a governmental entity; or (4) file a complaint or testify or assist in a proceeding. In addition, the Act forbids coercion, intimidation, threats, or interference with a

person in the exercise or enjoyment of rights granted or protected by the law or because a person aided or encouraged another person in the exercise or enjoyment of rights granted or protected by the law.

Statute of limitations

In addition to relief authorized by the NJLAD, an employee who files a complaint alleging unlawful pay practices may obtain back pay for up to six years so long as the violations continue within the six-year period. Also, the law makes it unlawful to require employees or prospective employees to consent to a shortened statute of limitations or to waive any protections afforded under the NJLAD.

Available damages

In addition to damages permitted under the NJLAD, the new law allows victims of discrimination to recover triple damages if a jury or the New Jersey Division of Civil Rights determines that the employer is guilty of an unlawful employment practice as defined by the law.

Reporting obligations

To ensure companies doing business with the state comply with the new law, companies that win contracts from public agencies are required to submit reports to the commissioner of the New Jersey Department of Labor and Workforce Development (NJDOL). The reports must include the gender and race of employees in every job title or pay band and the total compensation for each category of employees.

Bottom line

Employers should carefully analyze their existing pay practices to ensure compliance with the new law. Before July 1, employers must review their current job descriptions, employee handbooks, and policies to determine which employees perform "substantially similar work" to ensure they are compensated at the same rate. If there is a pay differential, the employer must be able to show that the difference is not based on sex or another characteristic of members of a protected class.

Existing handbooks and policies must be revised to prohibit pay discrimination for substantially similar work and prohibit retaliation against employees who request, discuss, or disclose compensation or other job-related information covered by the law. Also, HR and benefits personnel should be trained on the new requirements, and managers should receive updated training as well.

Employers must be aware that the new law's provision for back-pay damages is much more extensive than the provision under federal law, and the possibility of triple damages (should a jury find an employer guilty of an unlawful employment practice) should serve as a powerful deterrent to discriminatory pay differentials. Lastly, employers that work with public entities must ensure that payroll records and other information regarding the "gender, race, job title, occupational category and rate of compensation" of every employee who is part of the project are up to date and are sent to the public entity.

Excerpted from *New Jersey Employment Law Letter*
John C. Petrella, Dina M. Mastellone, Editors
Genova Burns

Regulations

Arizona

Unemployment Insurance

Amendments to unemployment insurance law

The Department of Economic Security adopted amendments to improve clarity, define the terms "able to work" and "available to work," cover provisions for pregnant unemployment insurance claimants and their ability to work, and state that severance pay is considered a "wage" to maintain consistency with statutes.

Cite: A.A.C. R6-3-51140, 5205, 5240, 52235, 55460 (24 A.A.R. 1417, 05/11/2018) (5 pages)

Adopted: 5/11/2018

Effective: 6/19/2018

http://apps.azsos.gov/public_services/register/2018/19/contents.pdf

California

Health Insurance

Application, eligibility, and enrollment in the SHOP exchange

The California Health Benefit Exchange adopted emergency rules to amend regulations governing the application, eligibility, and enrollment in the exchange's Small Business Health Options Program (SHOP). Amendments reflect changes in state and federal law and modify requirements to reflect best practices in the program.

Cite: Cal. Code Regs. Tit. 10, § 6520, 6522, *et seq.* (CRNR 2018, Volume No. 18-Z, 05/04/2018, page 719) (9 pages)

Adopted: 4/20/2018

Effective: 4/20/2018

https://govt.westlaw.com/calregs/Search/Index

Healthcare Professionals

Fee schedule

The Board of Pharmacy amended various licensure, renewal, and delinquency fees in accordance with the modified fee schedule set forth in Business and Professions Code Section 4400.

Cite: Cal. Code Regs. Tit. 16 § 1749 (CRNR 2018, No. 18-Z, 05/04/2018, page 719) (1 page)

Adopted: 4/20/2018

Effective: 4/20/2018

https://govt.westlaw.com/calregs/Search/Index

Colorado

Licensure—Healthcare Professionals

Nursing education programs

The Board of Nursing amended regulations governing the

approval of nursing education programs, with sections concerning definitions, purposes of program approval, requirements for programs, the process for establishing and obtaining approval for a program, and the withdrawal and restoration of approval.

Cite: 3 C.C.R. 716-1 (41 CR 10, 05/25/2018) (18 pages)

Adopted: 4/18/2018

Effective: 6/14/2018

www.sos.state.co.us/CCR/Upload/AGORequest/AdoptedRules02018-00094.rtf

Illinois

Employment Agencies

Operation of private employment agencies

The Department of Labor amended rules to establish application fees for agency licensure for private employment agencies in accordance with statute.

Cite: 68 Ill. Admin. Code 680 (42 Ill. Reg. 8323, 05/18/2018) (5 pages)

Adopted: 5/18/2018

Effective: 5/4/2018

www.cyberdriveillinois.com/departments/index/register/volume42/register_volume42_issue20.pdf

Iowa

Occupational Safety

Increased penalties for violations

The Labor Services Division increased the minimum and maximum civil penalties imposed for violating labor laws categorized as "willful" violations, "repeated" violations, "serious" violations, "other-than-serious" violations, and "failure to correct" violations.

Cite: Iowa Admin. Code r. 875 - 3.11(1) (40 Iowa Admin. Bull. 2973, 05/23/2018) (2 page)

Adopted: 5/2/2018

Effective: 6/30/2018

www.legis.iowa.gov/docs/aco/bulletin/05-23-2018.pdf

Workforce Development

Claims, benefits, and benefit payment control

The Workforce Development Department amended regulations for unemployment insurance to clarify the responsibilities of claimants to file continued claims, report on searches for employment, improve eligibility assessment and review of efforts to return the claimant to work, investigate fraud, and modify the schedule for repayment of overpayments.

Cite: Iowa Admin. Code r. 871 - 24, 871 - 25 (40 Iowa Admin. Bull. 2974, 05/23/2018) (12 pages)

Adopted: 4/25/2018

Effective: 6/27/2018

www.legis.iowa.gov/docs/aco/bulletin/05-23-2018.pdf

Missouri

Employment Security

Appeals

The Division of Employment Security rescinded regulations for appeal hearings and procedures to remove a provision that prohibited postponements of hearings under certain conditions.

Cite: 8 CSR 10-5.015 (43 MoReg 934, 05/01/2018) (3 pages)

Adopted: 5/31/2018

Effective: 6/30/2018

www.sos.mo.gov/cmsimages/adrules/csr/current/8csr/8c10-5.pdf

Healthcare Professionals

Licensing of physical therapists by reciprocity

The Board of Registration for the Healing Arts amended regulations for licensing by reciprocity of physical therapists to make it easier for qualified physical therapists to apply based on successful examination.

Cite: 20 CSR 2150-3.040 (43 MoReg 935, 05/01/2018) (1 pg.)

Adopted: 5/31/2018

Effective: 6/30/2018

www.sos.mo.gov/cmsimages/adrules/csr/current/20csr/20c2150-3.pdf

Healthcare Professionals

Licensing of physician assistants

The Board of Registration for the Healing Arts amended rules for supervision agreements in order to alleviate the burden on supervising physicians and physician assistants and rescinded rules for requests for waiver and waiver renewals.

Cite: 20 CSR 2150-7.135, 7.136, 7.137 (43 MoReg 935, 05/01/2018) (2 pages)

Adopted: 5/31/2018

Effective: 6/30/2018

www.sos.mo.gov/cmsimages/adrules/csr/current/20csr/20c2150-7.pdf

South Carolina

Discrimination

Filing of complaints

The Human Affairs Commission adopted amendments to include facsimile and e-mail alternatives for filing complaints of discrimination under the Human Affairs Law.

Cite: S.C. Code Regs. 65-2 (42-5 SC Reg. 93, 05/25/2018) (4 pages)

Adopted: 5/25/2018

Effective: 5/25/2018

www.scstatehouse.gov/state_register.php?first=FILE&pdf=1&file=Sr42-5.pdf

Discrimination

Investigation and production of evidence

The Human Affairs Commission replaced regulations to govern procedures for agency investigations based on complaints of unlawful conduct under the Human Affairs Law, detailing duties of the investigator, the scope of investigation, application and issuances of subpoenas, applications for enforcement, and access to information arising from the investigation.

Cite: S.C. Code Regs. 65-3 (42-5 SC Reg. 96, 05/25/18) (5 pages)

Adopted: 5/25/2018

Effective: 5/25/2018

www.scstatehouse.gov/state_register.php?first=FILE&pdf=1&file=Sr42-5.pdf

Analysis

Legislation

South Carolina enacts protections for pregnant employees and job applicants

by Richard J. Morgan

In its history, the South Carolina Human Affairs Law (SCHAL) has had very few amendments, but during the most recent legislative term, the South Carolina Legislature passed—and on May 17, Governor Henry McMaster signed—the South Carolina Pregnancy Accommodations Act. South Carolina joins 22 other states and the District of Columbia in providing specific statutory protection for pregnancy. Read on to see what the law provides.

Statute and its protections

The bill (H3865) was first introduced in the 2017-2018 session on February 28, 2017. It generally amends two section of the SCHAL:

- (1) Section 1-13-30, relating to definitions under the SCHAL, revising the terms "because of sex" or "on the basis of sex" used in the context of equal treatment for women affected by pregnancy, childbirth, or related medical conditions, and revising the term "reasonable accommodation" pertaining to what this term may include, and;
- (2) Section 1-13-80, relating to unlawful employment practices, by adding certain other unlawful employment practices in regard to an applicant for employment or an employee with limitations because of pregnancy, childbirth, or related medical conditions, as well as providing for notice and applicability to new and current employees to whom specific provisions apply.

The bill also contained provisions for certain public education efforts and regulatory oversight by the human affairs commission.

One of the key provisions is in Section 1-13-30(T), the South Carolina code's definition of what constitutes a "reasonable accommodation." The law now defines reasonable accommodation in the context of sex discrimination and pregnancy to include:

> making existing facilities used by employees readily accessible to and usable by individuals . . . with medical needs arising from pregnancy, childbirth, or related medical conditions provided the employer shall not be required to construct a permanent, dedicated space for expressing milk; however, nothing in this section exempts an employer from providing other reasonable accommodations; and. . .
>
> for individuals with medical needs arising from pregnancy, childbirth, or related medical conditions providing more frequent or longer break periods; providing more frequent bathroom breaks; providing a private place, other than a bathroom stall for the purpose of expressing milk; modifying food or drink policy; providing seating or allowing the employee to sit more frequently if the job requires the employee to stand; providing assistance with manual labor and limits on lifting; temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified; providing job restructuring or light duty, if available; acquiring or modifying equipment or devices necessary for performing essential job functions; modifying work schedules; however, the employer is not required to do the following, unless the employer does or would do so for other employees or classes of employees that need a reasonable accommodation:
>
> (i) hire new employees that the employer would not have otherwise hired;
>
> (ii) discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;
>
> (iii) create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee; or
>
> (iv) compensate an employee for more frequent or longer break periods, unless the employee uses a break period which would otherwise be compensated.

Another key provision is the amendment to actions that are unlawful employment practices. Those amendments appear in section 1-13-80(A) of the South Carolina Code. It is now unlawful for an employer:

- To fail or refuse to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant for employment or an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship to its business;
- To deny employment opportunities to a job applicant or employee, if the denial is based on the need to make reasonable accommodations to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions;

- To require an applicant or an employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that she chooses not to accept, if she doesn't have a known limitation related to pregnancy, or if the accommodation is unnecessary for her to perform the essential duties of her job;
- To require an employee to take leave under any leave law or policy if another reasonable accommodation can be provided to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions; or
- To take adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation.

In addition, the law requires employers to provide written notice of these rights to new employees at the time of hire and current employees within 120 days of May 17, 2018, as well as conspicuously post notice of these rights in the workplace. The South Carolina Human Affairs Commission is to engage in public education and has been given the authority to promulgate regulations to carry out this standard.

What this means for employers

Since the SCHAL was amended, these rights apply to those employers with 15 or more employees. The small employer exception would still apply—i.e., those employers with fewer than 15 employees. Although many of the items in the amendments to the SCHAL are already included in guidance from the Equal Employment Opportunity Commission (EEOC), the South Carolina law guarantees employees who are pregnant or new mothers will have reasonable workplace accommodations, which do not pose an undue burden on their employers, and protects them from having to either accept an unwanted accommodation or take a leave of absence when a more appropriate accommodation could be provided.

Many accommodations cost little or nothing to employers: allowing more frequent bathroom or food breaks, permitting coworkers to assist with heavy lifting, or providing a stool to sit on rather than standing for hours at a time. The statutory adoption is intended to reduce workforce turnover, increase employee satisfaction and productivity, and save money on workers' compensation and related costs. By giving women the flexibility to work while they are pregnant or breastfeeding, the statute's intent is to encourage their continued contribution to the economy while safeguarding a workplace environment that values their well-being.

Excerpted from *South Carolina Employment Law Letter*
Richard J. Morgan, Reginald M. Gay, Editors
McNair Law Firm, P.A.

Tennessee

Workers' Compensation

General rules of the workers' compensation program

The Bureau of Workers' Compensation adopted amendments to general rules of the workers' compensation program, replacing sections for scope and definitions, designation of insurance rate service organization, required proof of coverage filings, employer claims reporting requirements, medical panels, claims form and claims resolution filing requirements, additional forms, medical reports, civil penalties, records and copies, and required posting.

Cite: Tenn. Comp. R. & Regs. 0800-02-01 (Tennessee Secretary of State website, 03/02/2018) (9 pages)

Adopted: 3/2/2018

Effective: 5/31/2018

http://publications.tnsosfiles.com/rules/0800/0800-02/0800-02-01.20180531.pdf

Texas

Licensure

Licensing and regulation of insurance professionals

The Department of Insurance adopted amendments concerning licensing and continuing education requirements of insurance professionals, including agents, adjusters, public insurance adjusters, managing general agents, risk managers, and home office salaried employees, in order to implement legislative actions relating to licensing of military service members, military veterans, and military spouses.

Cite: 28 TAC §§ 19.801, 19.803 - 19.810, *et seq.* (43 TexReg 3367, 05/25/2018) (22 pages)

Adopted: 5/11/2018

Effective: 5/31/2018

www.sos.state.tx.us/texreg/archive/May252018/Adopted%20Rules/28.INSURANCE.html#111

Licensure—Healthcare Professionals

Nursing licensure, peer assistance and practice

The Board of Nursing adopted the repeal and replacement of regulations concerning the board's minor incident rule to provide guidance to nurses, nursing peer review committees, and others in determining whether a nurse has engaged in conduct that indicates a risk of harm to patients or others and regarding when errors should be entered into the Texas TERCAP online database or reported to the board instead.

Cite: 22 TAC § 217.16 (43 TexReg 3237, 05/18/2018) (9 pages)

Adopted: 4/30/2018

Effective: 5/20/2018

www.sos.state.tx.us/texreg/archive/May182018/Adopted%20Rules/22.EXAMINING%20BOARDS.html#56

Utah

Occupational Safety

Boiler, elevator, and coal mine safety

The Labor Commission adopted amendments to adopt the most recent nationally recognized safety codes as they apply to boilers and pressure vessels to maintain uniformity

between Utah and national standards, including ASME B31.1 - 2016, ASME Boiler and Pressure Vessel Code, Section 1 - 2017, ASME Boiler and Pressure Vessel Code, Section IV - 2017, and ASME Boiler and Pressure Vessel Code, Section VIII Div 1 - 2017.

Cite: Utah Admin. Code R616-2-3 (2018-9 Utah Bull. 80, 05/01/2018) (17 pages)

Adopted: 3/1/2018

Effective: 4/9/2018

https://rules.utah.gov/publicat/code/r616/r616-002.htm

Virginia

Licensure

Accountancy licensure

The Board of Accountancy Regulations adopted amendments to change the term of licensure to a term defined by the board, set the expiration date for all licenses as June 30, provide for the transition of existing licenses, including proration of fees, and change the existing fee schedule.

Cite: 18 VAC 5-22-20; 18 VAC 5-22-180 (34 VA Regs Reg. 19, 05/14/2018) (5 pages)

Adopted: 4/23/2018

Effective: 6/13/2018

http://register.dls.virginia.gov/details.aspx?id=6895

Licensure

Practice of pharmacy

The Board of Pharmacy adopted regulations to add seven compounds of research chemicals and synthetic opioids into Schedule I of the Drug Control Act as recommended by the Department of Forensic Science pursuant to statute, remaining in effect for 18 months or until placed in Schedule I by legislative action.

Cite: 18 VAC 110-20-322 (34 VA Regs Reg. 19, 05/14/2018) (4 pages)

Adopted: 4/13/2018

Effective: 6/13/2018

http://register.dls.virginia.gov/details.aspx?id=6896

Washington

Licensure

Engineering licensure

The Department of Licensing adopted amendments to registration regulations to allow out-of-state applicants who have passed the national board exam that are not licensed in another state to apply for initial licensure in Washington, codified board policies, and identified experience requirements for licensure as a structural engineer.

Cite: WAC 196-12-010 (WSR 18-10-085, 05/01/2018) (3 pages)

Adopted: 5/1/2018

Effective: 6/1/2018

http://lawfilesext.leg.wa.gov/law/wsr/2018/10/18-10-085.htm

Occupational Safety

Ground-fault protection requirements

The Department of Labor and Industries adopted amendments to the ground-fault protection requirements in marinas as specified by the 2017 National Electrical Code 555.3 to extend the 100mA ground-fault level allowance for feeders in the existing rule.

Cite: WAC 296-46B-555 (WSR 18-11-115, 07/01/2018) (2 pages)

Adopted: 5/22/2018

Effective: 7/1/2018

http://lawfilesext.leg.wa.gov/law/wsr/2018/11/18-11-115.htm

Workers' Compensation

Medical fees and conversion factors

The Department of Labor and Industries adopted amendments to update conversion factors and maximum daily fees for certain professional healthcare services for injured workers, increasing the resource-based relative value scale, anesthesia conversion factors, and the maximum daily caps to be consistent with the changes for other professional fees resulting from increases in the relative value units published by the Centers for Medicare and Medicaid Services.

Cite: WAC 296-20-135; WAC 296-23-220; WAC 296-23-230 (WSR 18-10-082, 05/01/2018) (4 pages)

Adopted: 5/1/2018

Effective: 7/1/2018

http://lawfilesext.leg.wa.gov/law/wsr/2018/10/18-10-082.htm

Wisconsin

Licensure—Healthcare Professionals

Nurse licensure compact

The Board of Nursing adopted emergency revisions to regulations to create necessary definitions relating to the nurse licensure compact, limit the application of rules to single state licenses, create qualifications for a multistate license based on the uniform licensure requirements, and delineate the application process for the multistate license.

Cite: Wis. Admin. Code § Ch. N 2; Ch. N 9 (749B Wis. Admin. Reg., 05/29/2018) (5 pages)

Adopted: 4/10/2018

Effective: 5/4/2018

http://docs.legis.wisconsin.gov/code/register/2018/749A1/register/emr/emr1812/emr1